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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-28

INSTITUTE OF SCRAP IRON AND STEEL, INC., Et Al., - - - - - - - - Appellants,

versus

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, Et Al., - - - - - - - - - Appellees

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

APPELLEES' MOTION TO AFFIRM

(See inside cover for list of attorneys)

Due Date: August 4, 1975

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Pursuant to Rule 16(1)(c) of the Rules of this Court, the Railroad Appellees move that the judgment of the district court be affirmed on the grounds that the questions presented are so unsubstantial as not to warrant further argument.

This is a direct appeal from a Memorandum-Order of a Three-Judge United States District Court for the District of Columbia, filed March 17, 1975. By that

Order the Court unanimously affirmed the September 19, 1974, Decision of the Interstate Commerce Commission in *Institute of Scrap Iron and Steel, et al.* v. *Aberdeen and Rockfish Railroad Company, et al.* and dismissed Appellants' complaint attacking the Commission decision. By its September 19, 1974, Report Upon Further Consideration, the Commission upheld as not unjust and unreasonable a tariff rule requiring the acceptance by a consignor of consignee's weights for the assessment of freight charges. The Commission further held that the tariff item in question is not a departure from past trade customs and practices with respect to the weighing of freight to determine freight charges.

OPINIONS BELOW

The initial decision of which Appellant sought judicial review below is *Institute of Scrap Iron and Steel, Inc., et al.* v. *Aberdeen & R.R., et al.*, 341 I.C.C. 771 (1972). The July 9, 1973, Memorandum—Order of the District Court remanding the proceedings to the Commission for a statement of facts and reasons in support of the Commission's decision is attached to Appellants' Jurisdictional Statement as Appendix B. The report of the Commission upon further consideration, dated December 19, 1974, is attached to Appellants' Jurisdictional Statement as Appendix C. The Memorandum-Order of the District Court, dated March 17, 1975, is attached to Appellants' Jurisdictional Statement as Exhibit D.

QUESTION PRESENTED

Whether the District Court erred in affirming the Commission's decision below and dismissing Appellants' complaint.

PROCEEDINGS BELOW

This litigation had its inception nearly six years ago by the filing with the Commission, in December, 1969, by Appellants herein of a complaint attacking the provisions of a tariff item, insofar as it affects the movement of scrap iron and steel transported by railroads subject to Part 1 of the Interstate Commerce Act operating within or to and from Southern Freight Territory. The item in question is Item 415 (Rule 4) of Freight Tariff S-215-K and became effective September 4, 1969. The item is set out in full as Appendix F to Appellants' Jurisdictional Statement.

Basically, Item 415 provides that when there is in effect a destination weight agreement between the delivering carrier and the consignee, the weight of the lading determined by the consignee's weight will be used for the assessment of freight charges. If the shipper requests that the car be weighed in addition to the weight determined by the consignee pursuant to the weight agreement, a charge will be made for the additional weight requested by the shipper. Appellants thus no longer received the benefit of a "free" weigh which they could use to support a claim for loss and damage.

The complaint was assigned to an administrative law judge for the taking of evidence under the commission's Modified Procedure and the issuance of an Initial Decision. The law judge held that the item in question had not been shown to be unlawful, concluding that it was neither unjust nor unreasonable nor discriminatory on shipments of scrap metal moving to consumers who maintain track scales.

Appellants filed exceptions to the Administrative Law Judge's Initial Decision. The Commission's Review Board No. 4 on February 19, 1972, dismissed Appellants' complaint. Appellants' petition for reconsideration of the decision of the Review Board was denied by Division Two of the Commission by an order dated August 1, 1972. Appellants then petitioned the Commission for a finding that an issue of general transportation importance was involved in this proceeding. This petition was denied by the Commission by order dated September 5, 1972.

Appellants then filed the court action which is the subject of this statutory appeal. The complaint was filed in October, 1972, in the United States District Court for the District of Columbia and a three-judge court was convened in accordance with the terms of the statute. The three-judge court determined that a statement of the reasons elucidating the rationale for the Commission's decision was necessary before the court could proceed to consider the matter on its merits and remanded the case to the Commission for a statement of facts and reasons in the record supporting its decision of February 18, 1972.

The matter was further considered by the entire Commission in accordance with the court's remand, and on September 27, 1974, the Commission issued its decision articulating the rationale for its prior decision and affirming the result reached in its prior report.

Appellants filed objections to the Commission's report and replies were filed by the United States, the Commission and by appellee railroads. On consideration of the Commission's report upon further consideration, the lower court, noting that its scope of review is a narrow one, affirmed the Commission's decision and ordered that the complaint be dismissed.

THE QUESTIONS RAISED ARE UNSUBSTANTIAL

In their complaint to the Commission, as well as their complaint to the district court, Appellants urged that the tariff item in question was violative of numerous sections of the Interstate Commerce Act, including Section 20(11) and the common law applicable to common carriers. In addition to Section 20(11), other sections of the Act are referred to in Appellants' Jurisdictional Statement under questions presented. Appellants' argument in their Jurisdictional Statement that the questions presented are so substantial as to require plenary consideration with briefs on the merits and oral argument, for their resolution, is, however, directed toward Appellants' belief that the Commission decision, as affirmed by the district court, is violative of the requirements of Section 20(11) of the Act and of

the common law applicable to common carriers as well as of Sections 2 and 3 of the Act. Appellees' motion to affirm, therefore, will be in response to Appellants' arguments on these points.

A. There Has Been No Change in Commission Policy

Appellants urge on this Court that the majority of the Commission has in some manner changed a long-standing rule of the Commission and relieved common carriers of an alleged duty to weigh at its origin point carload freight tendered to the carrier by the shipper. Nothing in Section 20(11) of the Act imposes any such duty upon the railroads, that section merely requiring carriers to issue "a receipt or bill of lading" for any shipment tendered to it and imposing liability upon the carriers for loss, damage or injury to the property caused by any of the carriers involved in the transportation of the property. Appellants cite no case (neither judicial or administrative) in which it is held that the carriers must provide, free of charge, a weight to the shipper at point of origin for purposes of filing freight loss and damage claims. Appellees submit there are no cases and there is no such duty upon Appellees.

The Commission, in its report on further consideration of this case, dealt specifically with this question and held that there is nothing in the Act which requires a railroad to weigh a shipment at a particular time or in a particular way, neither is there a requirement that the railroads provide a weighing service as

part of the line-haul rate, other than for the purpose of computing freight charges (Jur. Stmt. App. C, p. 12a). In so holding, the Commission specifically considered the case relied upon by Appellants as establishing the "rule" that freight must be weighed at the point of origin or as near thereto as practicable, *In Re Weighing of Freight By Carrier,* 28 I.C.C. 7, 36 (1913). In that case, the Commission in no manner established the hard and fast rule, merely indicating that freight *ordinarily* should be weighed near the point of origin. Further, the issues in that case related solely to the use of weights for purposes of determining freight charges, and not for use in filing freight loss and damage claims (Jur. Stmt., p. 9). Appellants make no claim that the rule is in any respect unlawful because weighing for purposes of determining freight charges is not done at or near the point of origin.

As the Commission said in *Anaconda Copper Mining Co. Terminal Service,* 264 I.C.C. 103; 266 I.C.C. 387, 391: "It is of course the duty of carriers to weigh shipments to determine freight charges." The tariff item at issue here in no way diminishes that duty and Appellants do not contend that it does. Appellants' contention is that they are entitled to a free origin weigh so that they may file freight loss and damage claims against the carrier when the origin and destination weights do not agree. The Commission gave full consideration to this contention and held (Jur. Stmt., p. 13a) that "the railroads' only duty to weigh the freight is for the purpose of determining the proper freight charges." This is a duty to which Appellees

have been subject for many years and it is a duty which is not abrogated by the tariff item in question. The item is therefore, as the Commission held, fully consistent and entirely in accordance with past railroad weighing practices.

In affirming its prior decision, the Commission very carefully drew a distinction between a weighing service at origin for the benefit of the shipper and a weighing service at origin in accordance with the carriers' duty to determine freight charges. The Commission quite properly noted that there is no evidence that Appellees were performing origin weighing as a service for the benefit of the shipper, the sole purpose of weighing at or near origin being to determine freight charges in accordance with the carriers above-described duty. As the Commission correctly noted, any benefits which Appellants derived from the origin weighing were merely fortuitous and not a service to which Appellants are entitled as a matter of right.

Appellants argue that under Section 20(11) of the Act, Appellees are required to issue a receipt for the goods shipped and that such receipt must include the weight of the goods being shipped. The cases relied upon by Appellants do not support Appellants' argument. The issue involved here was not considered by the Commission in *Rules, Regulations and Practices of Regulated Carriers With Respect to the Processing of Loss and Damage Claims,* 340 I.C.C. 515 (1972), the Commission merely noting, at 584, that the bill of lading is a receipt for the goods shipped. Nothing in that decision relates to the contention of Appellants that

such receipt must contain information as to the weight of the goods being shipped.

Appellants argue that Appellees are insurers of the goods received by them for transportation and that they may not limit their liability with respect to those goods and that the effect of the item in question is to limit such liability because Appellants no longer have an origin weight against which they can compare the destination weight for purposes of filing freight claims. This argument was adequately dealt with by the Commission in its report on further consideration. There the Commission noted that there is no historical precedent requiring that shipments be weighed at origin in order to determine freight charges or that the actual weight must be inserted in the bill of lading. The Commission relied on *Baird* v. *St. Louis, I.M. & S. Ry. Co.,* 41 F. 592, 594 (E.D. Ark. 1890), in which the court stated:

> "Bills of lading are frequently issued before the weight of the freight is known. It is not necessary to the issuance of a bill of lading that it should be known."

Appellants urge the *Baird* case is inapplicable to the situation here, since it was decided before the Carmack Amendment of 1906. This fact does not distinguish the case, however, for, as the Commission noted in *Loss and Damage, supra,* at 522, the purpose of the Carmack Amendment and the second Cummins Amendment thereto was to restore the law of full liability as it existed prior to the Carmack Amendment of 1906.

Thus, the law extant at the time of *Baird* was the common law of carrier liability, the precise law of carrier liability which the Carmack Amendment was designed to restore. As the Commission noted in *Loss and Damage, supra,* "the law of full liability as it existed prior to the Carmack Amendment in 1906 has been in effect, . . ." since the Second Cummins amendment (*Ibid*).

Subsequent to the enactment of the Carmack Amendment, the United States Court of Appeals for the District of Columbia in *United States* v. *Interstate Commerce Comm'n,* 73 F. 2d 948 (Ct. App. D.C. 1934), *cert. denied,* 294 U. S. 712 (1935), held:

> "But there is nothing in the act itself, and nothing in the published tariff—certainly nothing which may be said to be beyond dispute—which, as we think, makes it the duty of the railroad company to ascertain the weight of the shipment in any particular manner."

In this case the court had under review a Commission decision approving a tariff item providing for alternate means of determining the weight of cattle for purposes of assessing freight charges. The Commission found the tariff item to be lawful. The court, in upholding the Commission's decision and thus the lawfulness of the tariff item in question, stated that the carriers had a duty to furnish all necessary service incident to the carriage, including the ascertainment in some way of the accurate weight of the shipment, since the assessment of transportation charges is based on the weight of the cattle (*Id.* at 951). The court then

went on to make the statement quoted above to the effect that nothing in the Interstate Commerce Act requires the railroad to ascertain the weight of the shipment in any particular manner. Here the consignee's position was that the cattle were required to be weighed at destination in the stockyard pens just prior to delivery to the consignee. Thus the consignee desired the very thing Appellants here object to; that is, destination weighing of commodities shipped on the railroad. Under the tariff the carrier had the option of weighing for the assessment of freight charges by use of track scales or by destination hoof weights where available. The track scales were used in this case and it was the use of such track scales that was the source of objection by the consignee. The court approved the tariff providing for alternative means of weighing the shipment.

Appellants' contention that the carriers are seeking to exempt themselves from their liability for loss and damage to shipments is similarly without merit. As the Commission noted in its report on further consideration, there is no evidence to suggest that there is any subversion of a shipper's ability to settle its loss and damage claims. As the Commission stated: "Moreover, there is nothing in the tariff at issue to prevent shippers who suspect that there may be losses in transit from receiving a weighing at or near point of origin." (Jur. Stmt. App. C, p. 17a).

B. The Tariff Is Not Discriminatory

Appellants' contentions that the tariff item at issue here is discriminatory ignores the sole purpose for which weights are determined, that is, for the assessment of freight charges. The weighing is not for the benefit of the shipper, and it is the circumstances of the particular shipper involved (which appellees cannot control) that determine whether a weight will be determined at or near origin or at a destination point. There is no discrimination here for the tariff item is available to all. Since the weighing is not for the benefit of the shippers but is solely for determination of freight charges, the shipper does not "receive" a weighing either at origin or destination. As the Commission noted, any benefits which shippers derived from origin weighing were merely incidental and fortuitous (*Ibid*). The Administrative Law Judge correctly held that regardless of where weights are taken, shippers pay the same charges for like or contemporaneous services, since the shipper pays no charge for the weighing to determine freight charges.

From the foregoing, it is apparent that the questions presented here have been thoroughly and adequately considered at all administrative levels in the Interstate Commerce Commission. As this Court is well aware, the scope of judicial review of Commission decisions is quite narrow and is limited to a consideration of whether the decision of the Commission is based on a consideration of the relevant factors and whether there has been a clear error of judgment. *Bowman Transportation, Inc.* v. *Arkansas Best Freight System,*

Inc., 419 U. S. 281, 285 (1974). The lower court, on consideration of the report and order of the Commission on further consideration and of the standard of review, stated in the *Bowman* case, affirmed the decision of the Commission and dismissed Appellant's complaint.

Thus it is that the questions involved in this case have been considered at length at the agency level by an Administrative Law Judge, by the Commission's Review Board No. 4, by Division 2 of the Commission, by the Commission itself on petition for reconsideration and on petition for a finding of general transportation importance, by the entire Commission again on remand by the district court for further consideration and by the district court below. All the questions raised by Appellants have been considered and at each level of consideration the contentions raised by Appellants have been found to be without merit. In view of the extensive consideration given the questions raised by Appellants, it is clear that no useful purpose can be served by further plenary consideration, with briefs on the merits and oral argument, by this Court.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the United States District Court for the District of Columbia in Civil Action No. 2090-72, *Institute of Scrap Iron and Steel, Inc.* v. *The United States of America and Interstate Commerce Commission,* affirming the decision of the Commission on further consideration. It is manifest that the questions on

which the decision of the cause depend are so unsubstantial as not to need further argument.

Respectfully submitted,

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